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No. 87-548

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Summary Response

Respondent essentially ignores Petitioner's brief and that of *amicus curiae* National Labor Relations Board—both of which demonstrate that the body of established authority under the National Labor Relations Act ("NLRA"), even if applied to the Railway Labor Act ("RLA"), is contrary to the decision below. Indeed, although Respondent below and the court of appeals (to the extent they relied on any authority) based their arguments and rationale on NLRA decisions, Respondent now takes Petitioner to task for discussing their erroneous interpretation of those decisions. (Resp. Br. 40)[1]

Before this Court, Respondent postulates a Railway Labor Act that does not exist and a "seniority" right never agreed to by the parties, in order to invent promises of "exemptions from neutral seniority rules" (Resp. Br. 37) that were never made, and to hypothesize discrimination among members of the active workforce that did not occur and was not alleged below.[2] In effect, it urges that national labor policy be rewritten to vitiate the free choice of employees not to support a strike, and asks

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1 Respondent's brief on the merits is referred to as "Resp. Br."; Petitioner's brief, as "Pet. Br."; the Appendices to the Petition for Certiorari, as "App. Cert."; the Joint Appendix, as "JA"; and the brief of *amicus curiae* National Labor Relations Board, as "NLRB Br.".

2 Respondent's theory depends on and repeats the arguments it made in *Trans World Airlines* v. *Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), *aff'd by an equally divided Court*, 108 S. Ct. 1101 (1988), *pet. for reh'g pending* ("*TWA I*"). Its principal reliance is on *Brotherhood of Ry. and Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) ("*FEC*"), which was nowhere mentioned by the court of appeals in this case. The court did say that the underpinning of the decision below was its holding in *TWA I* (based on its misreading of *FEC*) that the union security clause survived the expiration of the status quo period. But Respondent now repudiates that stated rationale—saying unequivocally that its brief "proceeds on the premise that the union security clause is indeed *irrelevant*. . . ." (Resp. Br. 4 n.6; emphasis in original) It goes on to say that "the court of appeals' result, and the basic thrust of its reasoning, are nonetheless correct." (*Id.*) Once reliance on the union security clause is removed, however, there is no other reasoning.

the Court to undo major consequences of a hard-fought economic struggle permitted by the RLA—a struggle that IFFA continued for over ten weeks to a failed conclusion.

It has long been the settled rule, based primarily on NLRA authorities, that absent a back-to-work agreement to the contrary, economic strikers are not entitled to reinstatement unless there are *vacancies* in the workforce. (*See* Pet. Br. 18-31; NLRB Br. 7-13.) Nonetheless, the claim is made here that strikers have a right, on the basis of "seniority," to create vacancies by *displacing* active employees. This asserted right, according to IFFA, extends to all jobs held by flight attendants employed before the strike began who exercised their right to work during the strike ("incumbent employees"); it does not extend to jobs held by new-hire replacements, although they have less "seniority" than the strikers and the incumbent employees.

The Union concedes (as it must) that TWA had the "right to continue operations during [the] strike." (Resp. Br. 31) Also accepted, at least for purposes of this case, is TWA's right to hire "outside permanent replacements," *i.e.*, new hires. (Resp. Br. 33 n.23) It follows that under the RLA (as well as the NLRA),

- the threat of job loss due to the use of new-hire replacements—although it may induce individual decisions to abandon collective activity—does not have an impermissibly "coercive impact upon the exercise of the right to strike" (Resp. Br. 6);
- actual job loss—even if it reflects "mass turnover of employees" (Resp. Br. 7) and is the consequence of strike participation—does not impermissibly "burden the right to strike" (Resp. Br. 6); and
- TWA's retention of new hires—"in preference to more senior full-term striking employees" (Resp. Br. 4)—did not constitute "employer retaliation for strike participation" (Resp. Br. 6).

As the district court correctly concluded (App. Cert. 24-25), there is no basis in law or in reason for distinguishing between TWA's refusal to displace new hires in order to create vacancies

for strikers and its retention of incumbent employees. IFFA has repudiated the sole basis on which the Eighth Circuit relied in purporting to create a distinction. (*See* App. Cert. 7 n.4; n.2, *supra*.) Indeed, in the course of a confused attempt to distinguish between new hires and pre-strike employees, IFFA acknowledges that, even under its "approach," "the same basic analysis would apply to outside replacements and to crossovers." (Resp. Br. 39 n.28)

Respondent nonetheless argues that allowing or "inducing" a pre-strike employee to work during a strike, with the understanding that he will remain in the job after the strike is over, is somehow "illegally coercive of the right to strike" (Resp. Br. 40)—although similar treatment of new-hire replacements is not "illegally coercive." Nothing in this Court's decisions, however, or in those of the lower courts, even suggests that the decision of an incumbent employee not to strike, or to abandon a strike, interferes with the right of other employees to strike. Respondent asks this Court to establish a new rule that no incumbent employee can prevent his job from being at risk, because of a strike in which he does not participate, so long as more senior employees choose to remain on strike.

IFFA cites no decision in which any court has reached the result it urges here. Instead, the refrain of its theory is fabricated RLA "stability" or "continuity" concerns (Resp. Br. 7) nowhere expressed in the language or history of the Act or in the decisions interpreting it. Relying on these so-called "stability concerns," IFFA portrays the RLA as a scheme intended

- to "protect" (Resp. Br. 15) rather than to "prevent" strikes (*Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 148 (1969));
- to compel adherence to "*collective* decision" (Resp. Br. 37; emphasis in original) rather than to accommodate a " 'long standing tradition of voluntary unionism' " (*Communications Workers* v. *Beck*, 108 S. Ct. 2641, 2653 (1988)); and
- to "require" as a matter of law a "seniority" right (Resp. Br. 35) that the Union did not achieve through the process of "self-adjustment" the Act was designed

to foster (*Machinists* v. *Street*, 367 U.S. 740, 772 (1961)).

The "stability" required by the RLA, however, is the status quo mandated "*until* all the settlement procedures provided by the RLA have been exhausted," as they were here. *Burlington N. R.R.* v. *Maintenance of Way Employes*, 107 S. Ct. 1841, 1851 (1987) ("*Burlington*") (emphasis added). And, the only "continuity" concern expressed in the Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." (RLA § 151a(1)) The Act is silent as to any "stability" or "continuity" once its stability-oriented processes have failed and a strike has occurred.

There is no dispute that the RLA preserves the right to strike. There should also be no dispute that strikes are not necessarily cost-free. A strike is no mere exercise or game with a return to square one at its end; it is economic warfare, undertaken only at significant risk of change for *all* parties. The RLA does not guarantee that a strike will be effective; it contains no assurance that a striker's job will be there when the union decides to call off the strike; and, if an ill-conceived strike fails, the RLA does not (as IFFA contends) entitle the union, upon demand, "to return matters to what they would have been . . . had there been no strike." (Resp. Br. 34)

The thrust of Respondent's brief seems to be a reargument of its contentions in *TWA I*, coupled with reliance on emotionally-charged concepts, which have no application here.[3] What *FEC* means for the construction of the RLA has been fully developed in the briefs in *TWA I*, and this reply brief is not the place to restate that simply because Respondent chooses for the first time to make *FEC* the major focus of its argument, having repudiated as "irrelevant" the rationale of the court below. Since Respondent has now made *FEC* central to its argument,

3 Because the equally divided affirmance in No. 86-1650 left unresolved the limitations of *FEC*, Respondent is free here to rely on the Eighth Circuit's misreading of *FEC* (in *TWA I*) and to premise its entire argument on the contention that postulated pre-strike conditions are continued "by virtue of the statute" (Resp. Br. 33), regardless of the terms of the contract. IFFA's reliance on *FEC* in this case only highlights the need for guidance from the Court concerning the proper application of that decision.

however, it becomes even more imperative that rehearing in *TWA I* be granted and that both cases be considered together on the full briefings in each. The remainder of this brief will reply to Respondent's contentions about the reemployment rights of strikers—the issue in *this* case—with only summary reference to Respondent's misuse of *FEC*.

The Question Before The Court

No mere repetition of inapplicable concepts like "post-strike preference," "employer retaliation" and "coercive employer action" will make them true or relevant. And, "[p]utting the wrong questions is not likely to beget right answers even in law."[4] It is, therefore, worth restating the question that *is* before the Court—which is correctly answered in the brief of *amicus curiae* National Labor Relations Board:

> The suggestion that refusing to displace junior crossover employees with returning full-term strikers discriminates on the basis of union activity is unfounded. The full-term strikers are not denied reinstatement because of the degree of their union activity. They are denied reinstatement because there is no available vacancy for them to fill. (NLRB Br. 6)[5]

Nothing in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) ("*Mackay Radio*"), or any other decision of

4 *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring).

5 The Union ignores the absence of vacancies and contends—but only when its purposes are served by doing so (*cf.* pp. 7-8, *infra*)—that flight attendant jobs "are so fluid and fungible as to make . . . a precise determination of whose job is filled and whose is not quite impossible." (Resp. Br. 49 n.34) If flight attendant jobs are "fungible," all flight attendants in the active workforce must be viewed as an undifferentiated group, filling indistinguishable jobs, and the new hires *not* previously in the workforce can only have replaced the strikers on the rehire list; they cannot be *replacing* the "crossovers" with whom they have been working since before the end of the strike. *See, e.g., Laidlaw Corp.*, 171 N.L.R.B. 1366, 1385 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

this Court, suggests any limitation on the employer's right to refuse to discharge those who worked during an economic strike "in order to create places for [strikers]." The retention of those who worked—*in and of itself*—is a " 'legitimate and substantial [business] justification' " for refusing to reinstate strikers. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983); *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).[6] That

6 IFFA points to no decision that has even inquired into whether an employer "attempt[ed] . . . to operate" without making assurances of permanence (Resp. Br. 39) or whether it was "necessary" for the employer to make such assurances in order "to continue operations during [an economic] strike" (Resp. Br. 40)—let alone required such a showing. This is so because "*Mackay* eliminates the need for any case-by-case application of the [business need] test to justify the hiring of permanent replacement workers. . . ." *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 929 (7th Cir. 1982). Leaving aside the impracticability of attempting first to operate with temporary employees (and the losses attendant upon failure), and the chilling effect of review by hindsight dependent " 'upon judicial views of social and economic policy' " (*Burlington*, 107 S. Ct. at 1850), if any "need" test is to be established, it is for Congress, not the courts. *See* Pet. Br. 21-22 n.18; *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

Neither *Mackay Radio* nor its progeny, moreover, suggest a need to inquire whether employees who worked during a strike were "giving up their regular employment." (Resp. Br. 38) To the contrary, the "replacements" in *Mackay Radio* were already employees of the company (or its parent) "transferred from employment" at other places, after they chose not to join the strike, to a location where their services were needed. *See* 1 N.L.R.B. 201, 206, 216 (1936); 304 U.S. at 337. All were free to return to their previous positions and some, in fact, did so. 304 U.S. at 338-39. Plainly then, there was "no need to offer permanence in order to induce [them] to give up a *different*, permanent job." (Resp. Br. 38; emphasis in original). *See also, e.g., H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357, 362 (2d Cir. 1972).

Respondent contends that "a permanent replacement policy, standing alone, does not encourage *individual* decisions to split off from the group . . ." and return to work. (Resp. Br. 37; emphasis in original) On the very next page, however, IFFA points out that this Court has recognized as among the reasons why an *individual* employee may decide to abandon a strike the fact that "the ease with which the employer replaces the strikers may make the strike seem less provident." *NLRB* v. *Granite State Joint Bd.*, 409 U.S. 213, 217 (1972). *See also, e.g., Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1244 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

Although not disputing that individual flight attendants had a *right* to refrain from striking (even under Respondent's theory), IFFA speaks of

principle applies equally to new-hire replacements and pre-strike employees. There is no rational basis for concluding that pre-strike employees had *lesser* rights to retain their jobs at the end of the strike than did new-hire replacements. (*See* App. Cert. 24-25; Pet. Br. 26-31; NLRB Br. 6-7, 12-16.)

The Court's ruling in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) ("*Erie Resistor*") did not "largely revolve around the circumstance that in that case, the employer's policy gave preference to crossovers over full-term strikers . . . ." (Resp. Br. 45) *Erie Resistor* involved the award of twenty years "super-seniority" for layoff purposes to new hires and crossovers—thereby ensuring that, in the event of future reductions in the active workforce, reinstated full-term strikers would be laid off first. Nothing of the sort happened here: incumbent employees had only the right to the jobs they filled—no more, no less. (*See* Pet. Br. 41-48.)

IFFA's allegations concerning the supposed effects of the retention of incumbent employees on "*returned* full-term strikers" (Resp. Br. 47; emphasis in original) are a belated attempt to turn this into a different case by asserting a cause of action not stated in its complaint (App. Cert. 47-56) and not presented to the courts below. (*See* Resp. Br. 2: IFFA's claim was that TWA denied "reinstatement" to over 2,000 of the full-term striking employees.) Now, however, in a transparently flawed attempt to portray this case as involving the concerns voiced in *Erie Resistor*, IFFA speculates that, after the strike, early returning strikers were "cement[ed] . . . into more desirable jobs" (presumed to be in the California domiciles) and that "[t]he result, for *returned* full-term strikers, is that their pre-strike expectations regarding their job assignments were indefi-

"*individual* decisions to split off from the group" (Resp. Br. 37; emphasis in original) as if they were anathema to the RLA. To the contrary, the RLA expressly protects the right of employees "*not* to join or remain members of any labor organization. . . ." 45 U.S.C. § 152 Fourth (emphasis added). Indeed, it is so commonplace in industrial disputes that some employees choose, *for reasons best known to them*, not to participate in a strike, that union constitutions provide for that eventuality. This Court's decisions in *Granite State, supra*, and *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985), protect employee freedom to make that choice.

nitely defeated in favor of junior crossovers." (Resp. Br. 12, 47; emphasis in original)[7]

If full-term strikers domiciled in California before the strike were reinstated to "other jobs," it was because their pre-strike jobs had been filled—either by a new hire, an earlier returning striker or a full-term striker already reinstated. And, if a reinstated striker has not yet been able to transfer to a California domicile, it is not due to any "preference" awarded by TWA, but because application of the pre-strike seniority rules—which IFFA insists must be maintained—has not resulted in a transfer. (*See* pp. 13-15, *infra*.) In short, IFFA's assertion that the "pre-strike expectations" of "*returned* full-term strikers" have been "defeated" (Resp. Br. 47) is but another way of complaining that TWA filled "places left vacant by strikers." *Mackay Radio*, 304 U.S. at 345.

Similarly, the "promises" of which IFFA complains (Resp. Br. 37) were simply statements by TWA to the effect that it would not enter into a back-to-work agreement under which working flight attendants (whether new hires or pre-strike employees) would be displaced to make room for strikers—a position that TWA had the right to take and maintain. If any "competition" was created for post-strike jobs (Resp. Br. 12), it resulted from TWA's exercise of its undisputed right to employ permanent replacements. If "expectations" were

7 Before the district court, Respondent said: "It is nonsense to contend that a person holding a cabin attendant slot in the Los Angeles domicile holds a . . . 'position' *different* from a cabin attendant slot held by a person at the JFK domicile in New York." (IFFA's Supplemental Suggestions, at 9; emphasis in original)

In any event, as the parties stipulated, at the end of the strike, 383 of the jobs in the California domiciles were filled by permanent replacements hired during the first few days of the strike alone, 1036 (or over 80%) of the 1284 early returning strikers were domiciled in New York or St. Louis, and only 220 (or about 17%) were domiciled in California. (App. Cert. 60, 61 ¶¶ 20, 26) As IFFA well knows, moreover, since the strike ended, 200 full-term strikers have obtained jobs at the Los Angeles domicile. As IFFA also knows, because so few active flight attendants (be they new hires, "crossovers" or full-term strikers) have bid for the "more desired" (Resp. Br. 13) service manager openings, TWA has had to "draft" the *least senior* cabin attendants (*i.e.*, new hires) to fill those openings. This procedure was provided for in the 1981-84 agreement. (JA 78)

denied (Resp. Br. 35), they were expectations created by IFFA through its puffery about back-to-work agreements.[8] The only "retaliation" (Resp. Br. 19) is IFFA's effort to displace incumbent employees in order to make places for strikers whom it views as having shown more "fealty" (Resp. Br. 34) to the Union. And the only "poststrike preference" (Resp. Br. 8) in question is that which IFFA seeks for full-term strikers over less senior employees who abandoned or refused to join the strike—a "preference" that the Union had the right to *attempt* to negotiate but did not achieve, either in the expired 1981-84 agreement, or in a back-to-work agreement.[9]

8 IFFA literature (to those it referred to as "strikebreakers" and "scabs") emphasized that it had the "right to *negotiate* a 'BACK-TO-WORK AGREEMENT' which ensures the return of all our members to the job" and that "all prior strikes at TWA [had] resulted in such a back to work agreement." (Exhibit H-2 to Henderson Affidavit, dated August 6, 1986, reproduced at 249-50 of Joint Appendix before the Eighth Circuit; emphasis added) The real gravamen of IFFA's complaint is its inability, due to a lack of economic strength, to obtain that back-to-work agreement. It is that inability that the Union asks this Court to cure, as if the heart of the Act were the judicial imposition of back-to-work agreements rather than a machinery to promote the self-adjustment of disputes.

IFFA makes much of the supposed "expectations" of the strikers, " 'reinforced by a sense of rightness of the basic principle of length of service.' " (Resp. Br. 35) It says nothing about whether there is any "sense of rightness" associated with requiring incumbent employees—who endured abuse, threats and intimidation in the belief that they were preserving their jobs—to give up those jobs to the very employees who had called them "scabs." (JA 105-06, 107-08, 154)

9 Typical of IFFA's attempt to obscure the economic realities that determine the outcome (and consequences) of a strike is its assertion that TWA's so-called "crossover policy" (which was nothing but a willingness to let incumbents keep their jobs) led to "the demise of the strike." (Resp. Br. 13) It ignores that (i) the "overwhelming" vote to strike (Resp. Br. 11 n.8) took place over nine months before the strike began (*IFFA* v. *TWA*, 682 F. Supp. 1003, 1008 (W.D. Mo. 1988), *appeal pending*), without any opportunity for flight attendants to vote on TWA's final offer; (ii) TWA was able to hire 2800 new permanent employees—at wages significantly below those offered to pre-strike flight attendants (*id.* at 1012-13 n.6, 1017); (iii) the TWA pilots and mechanics either would not (or could not) strike in support of IFFA's demands (*see TWA* v. *Machinists*, 629 F.Supp. 1554, 1558 (W.D.

In short, TWA's conduct was fully consistent with decades of authority under the NLRA. The only real question, therefore, is whether something in the RLA required TWA to grant to full-term strikers a "preference in employment," over less senior employees who worked during the strike, by removing the incumbents from the jobs they held and giving them to strikers.

The Fabricated "Stability Concerns"

Respondent posits three "stability" or "continuity" concerns as "envision[ed]" by the Railway Labor Act. All are fabrications derived exclusively from inapposite *dicta* in *FEC*. Not one is implicated by the question before the Court.

FEC has no bearing on this case; it was not even mentioned in the decision below. *FEC* did not involve, and the Court did not address, any right of strikers to reinstatement. Emphasizing that carriers have a duty to make "reasonable efforts to maintain the public service at all times" (384 U.S. at 245), the Court upheld the authority of the federal courts to permit a carrier to depart from the terms of an *existing agreement* to the extent "reasonably necessary" to operate during a strike. This case, however, presents no departure from any agreement, existing or expired. (*See* pp. 13-16, *infra*.)[10]

Ignoring the real Congressional objective of *preventing* strikes, the Union hypothesizes "continuity principles"

Mo. 1986)); (iv) when IFFA called off the strike, TWA had demonstrated its ability to operate for over ten weeks and was about to enter its peak season with nearly a full complement of flight attendants (JA 110); and (v) despite the ten-week strike and a national boycott effort, IFFA was unable to achieve an agreement on its terms.

10 Justice Douglas's comments, moreover, about the "community of striking employees and the carrier" and the "continuity of [that] relation" (Resp. Br. 26, 23) were not addressed to the respective rights of striking employees *vis-a-vis* one another, or to those of strikers and more recent additions to the "community" (*i.e.*, new-hire replacements). Even the particular pre-strike "community" of which he spoke did not experience "continuity" and was, in fact, "destroyed by the strike." 384 U.S. at 246-47. *See UTU* v. *Florida East Coast Ry.*, 586 F.2d 520, 522-23 (5th Cir. 1978).

designed not just to tolerate strikes when the lengthy major dispute procedures (and the concomitant status quo) have been exhausted, but to *protect* strikes (Resp. Br. 15)—as if the goal of Congress had been to increase the likelihood that strikes would be effective, by insulating employees from the consequences of striking and by perpetuating the "effective" representative status of incumbent unions, no matter how ill-advised the strikes they call. The Union cites no decision in the more than sixty years since the RLA was enacted even articulating its three "stability concerns,"[11] let alone applying them to require the reinstatement of economic strikers:

(1) This Court did not hold in *FEC*, or any other case, that "the RLA *itself* preserves the contractually-established pre-strike working relationships . . . ." (Resp. Br. 34; emphasis in original) To the contrary, *FEC* announced a special rule allowing *interruption* of the "continuity" established by contracts that, according to their terms, would otherwise have been in effect.

(2) Any RLA concern with the "continuity of employer-employee relationships" (Resp. Br. 30) focuses on the need to

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11 Contrary to Respondent's assertion that *FEC* interprets the RLA as requiring the *post*-strike "stability" IFFA favors, the only sense in which it is true that the purpose of Congress in enacting the RLA was to provide a machinery that would lead to "stability" is that, consonant with RLA § 151a(1), the principal objective of the Act is "to encourage collective bargaining by [carriers] and their employees *in order to prevent*, if possible, *wasteful strikes* and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 148 (1969) (emphasis added; footnote omitted). During the process of "virtually endless 'negotiation, mediation, voluntary arbitration, and conciliation' " (*Burlington*, 107 S. Ct. at 1850), "stability"—in the form of status quo conditions—is mandated by the Act. The statements drawn by IFFA from the legislative history of the 1936 amendments to the RLA (Resp. Br. 23-24), when read in context, make precisely this point. *Hearings Before the Senate Committee on Interstate Commerce on S. 2496*, 74th Cong., 1st Sess. at 26-27 (1935). If the processes of the Act fail to produce agreement, however, the parties "may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA." *Burlington*, 107 S. Ct. at 1851. Thus, the Act permits (if all else fails) and contemplates (if no Emergency Board is convened) the instability and discontinuity that result from the use of self-help.

maintain stability *while the dispute resolution procedures of the RLA are operating*. During such periods, injunctive relief is available to enforce the status quo.[12] When the procedures of the Act have been exhausted, however, a test of economic strength—including a break in the continuity of the employer-employee relationship through a strike—is the permitted means for resolving the parties' differences. IFFA cites no authority (and there is none) for the proposition that the continuity of the pre-strike "employer-employee relationship," once broken by a strike, must be resumed by displacing working members of the "community" in order to accommodate others.

(3) The third "continuity" posited by IFFA—continuation of the effective bargaining relationship between itself and TWA—seems designed to perpetuate the strength of a particular representative, without regard to the effect on employee freedom of choice clearly embodied in the Act (*see* RLA §§ 1a; 2 Third, Fourth and Ninth), and is derived solely from out-of-context quotation. Justice Frankfurter's dissent in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 753 (1945) (Resp. Br. 23)—speaking of a "process of permanent conference and negotiation"—is addressed to minor disputes and the Railroad Adjustment Board. His statements made plain, moreover, that the Act's overriding theme of self-adjustment was meant to restrict judicial interference in disputes except in extraordinary circumstances. 325 U.S. at 752. IFFA attempts to depart from the RLA principle of self-adjustment, by seeking judicial imposition of a back-to-work agreement it could not negotiate.

Finally, even if there were support for IFFA's "stability concerns," none of them is implicated here. TWA did maintain the pre-strike seniority rules in effect (*see* pp.13-16, *infra*); the

12 IFFA cites three cases for the proposition that " 'the Railway Labor Act is more concerned [than the NLRA] with continuance of the employer-employee relationship.' " (Resp. Br. 27-28) Not one addresses the employer-employee relationship *during the self-help period*. Two, however, establish that—even while the status quo obligations of the Act apply—an employer may permanently replace strikers. *See National Airlines* v. *Machinists*, 416 F.2d 998, 1007 (5th Cir. 1969); *Empresa Ecuatoriana De Aviacion* v. *District Lodge 100*, 690 F.2d 838, 846 (11th Cir. 1982).

displacement of one group of pre-strike employees (who are, after all, a part of the "community" of which IFFA so repetitiously speaks) in favor of another, does not prevent disruption of the employer-employee relationship;[13] and IFFA remains the certified representative of the flight attendants (both working and unreinstated), with no diminution of the capacity of employees to engage in collective bargaining. Undoubtedly, there has been a diminution of the Union's economic strength, but that is the natural consequence of a failed strike.

The So-Called "Rearrangement" Of The Seniority System

The *sine qua non* of Respondent's theory is its assertion that TWA "fundamentally rearranged [the pre-strike seniority] system, and the expectations of the employees inherent in the system" (Resp. Br. 5) when it refused to displace incumbent employees in order to reinstate strikers. In fact, however, TWA did maintain the pre-strike seniority rules during and after the strike, as IFFA tacitly acknowledges in its brief. (Resp. Br. 33) That some strikers on the preferential rehire list had more seniority than some incumbent employees (and more seniority than *all* new-hire replacements) was not the result of changed rules; it

13 IFFA never even attempts to explain how the mass turnover of hundreds of working flight attendants it advocates would *avoid* further disruption of the employer-employee relationship. Also pointedly ignored is that, if 1200 pre-strike flight attendants had not worked during the strike, either (or a combination) of two consequences would have followed: (i) TWA would have hired more replacements, which would have resulted in greater turnover of employees; and/or (ii) the operation of the airline would have been diminished, which even IFFA concedes is not preferred by the Act.

The "continuity" of TWA's relationship with the full-term strikers, moreover, has *not* been terminated. They were put on a preferential rehire list—from which over 2,500 have been offered reemployment; they continue to accrue seniority; and the National Mediation Board has ruled (albeit over an unprecedented dissent) that no representation election will be scheduled without a majority showing of interest among the working flight attendants *and* unreinstated strikers. *Trans World Airlines (Application of Prof'l Cabin Crew Ass'n)*, 15 N.M.B. No. 6 (1987). *See also Professional Cabin Crew Ass'n* v. *NMB*, No. 87-3346, slip op. (D.D.C. May 27, 1988), *appeal pending*.

was due to the choice of those employees to strike while others chose not to, and to the absence of vacancies, or any agreed-upon right to create vacancies, when the strike ended.

The Union concedes that, even if the 1981-84 agreement remained in effect, strikers had no contract right to displace incumbent employees on the basis of seniority. (Resp. Br. 34) Nonetheless, from the specific, collectively bargained uses of seniority that were provided for in the contract, the Union posits its "general seniority principles" (Resp. Br. 35) designed to bootstrap unreinstated strikers into the active workforce, despite the absence of vacancies, through a use of seniority *not* authorized by the contract. This maneuver is accomplished, IFFA says disingenuously, "[b]y a parity of reasoning" to *FEC*. (Resp. Br. 35)

Even as misconstrued by IFFA, however, *FEC* does not require more than the continuation of working conditions "embodied in agreements." 45 U.S.C. § 152 Seventh. It cannot be read as creating a *statutory* seniority right not provided for in the contract. As this Court has recognized, the uses of seniority are a matter of *agreement*. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949). Nothing in the RLA provides otherwise. "Seniority among railway workers is fundamentally and wholly contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." *Colbert* v. *BRT*, 206 F.2d 9, 13 (9th Cir. 1953), *cert. denied*, 346 U.S. 931 (1954).[14]

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14 *Accord*, *McMullans* v. *Kansas, O. & G. Ry.*, 229 F.2d 50, 53-54 (10th Cir. 1956); *Starke* v. *New York, Chicago & St. Louis R.R.*, 180 F.2d 569, 571 (7th Cir. 1950); *Elder* v. *New York Central R.R.*, 152 F.2d 361, 364-65 (6th Cir. 1945); *System Fed'n No. 59* v. *Louisiana & A. Ry.*, 119 F.2d 509, 514-16 (5th Cir.), *cert. denied*, 314 U.S. 656 (1941).

Reading the Railway Labor Act to *require* a particular use of seniority not agreed to by the parties would be fundamentally inconsistent with the "strong federal policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570, 579 n.11 (1971). The RLA simply " 'does not undertake governmental regulation of wages, hours or working conditions.' " *Locomotive Engineers* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 289 (1963).

The two cases cited by IFFA (Resp. Br. 13 n.12, 35 n.25, 37-38 n.26) dealt with a statute that *specifically* provided a right of seniority-based reinstatement and are, therefore, inapposite. And the Union's assertions concerning the virtues of seniority (Resp. Br. 13 n.12, 33-35), even if they were relevant, would apply more to new-hire replacements than to "crossovers" with years of pre-strike seniority.

An agreement to apply seniority "in the complicated bidding system" that determines each month, within a particular domicile, which active flight attendants will be scheduled on which flights (Resp. Br. 10), or to distribute work assignments "to and among the *active* workforce" on the basis of seniority (Resp. Br. 5; emphasis added), does not entitle *inactive* employees to claim the jobs of active employees. A contract right of recall from furlough, on the basis of seniority, to a "vacancy" in the workforce (Resp. Br. 10) cannot be transformed into a striker's statutory right to *create* a vacancy.[15] Nor do contract provisions limited to employees returning from an authorized leave of absence (*e.g.*, a medical leave, or a personal leave granted "[w]hen the requirements of the service will permit . . ." (Stipulations, Ex. 1, 91) constitute an agreement with respect to the reinstatement of strikers. As the district court concluded, in a finding not disturbed by the Eighth Circuit, the 1981-84 agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22)

Contract rights are the result of compromise. If IFFA desired for its membership a seniority right to return from a strike, it should have bargained—and given a *quid pro quo*—for that right. It is no answer to say that strikes are "not generally cov-

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15 The 1981-84 agreement well illustrates the particularity and variations in the use of seniority that are reached through collective bargaining. IFFA says, for example, that even when there *are* vacancies, furloughed flight attendants " 'have recall rights not to domicile but to classification only.' " (Resp. Br. 9) *See also* Article 15(E) (allowing flight attendants returning from a medical leave to "displace" the least senior employee at a particular "location") (Stipulations, Ex. 1, 92); and Article 12(G) (providing a right of recall from furlough only to a "vacancy") (JA 35).

Plainly, when the parties intended to authorize a right of displacement, they said so. And no matter how "fluid" the "employment situation" (Resp. Br. 9), flight attendants were not entitled to leave and reenter the active workforce, to the domicile or classification of their choice, at will. As to the reasons why particular uses of seniority were (or were not) agreed to by the parties (Resp. Br. 13 n.12), the record is silent.

ered in terms by [collective] agreements." (Resp. Br. 34)[16] As the brief of *amicus curiae* Airline Industrial Relations Conference notes (at 20 n.7), the uses to which seniority may be put by unreinstated strikers are commonly addressed in back-to-work agreements negotiated as part of strike settlements.

The Distortion Of RLA § 2 Fourth

It is clear from the statutory language and the legislative history, as well as judicial decisions, that RLA § 2 Fourth does not prohibit all "coercive employer action burdening the right to strike." (Resp. Br. 19) The portion of § 2 Fourth that IFFA uses to forge this all-encompassing and "explicit protection" of strikes (Resp. Br. 7) is designed to ensure "the right of . . . employees to join, organize, or assist in organizing the labor organization of their choice" (45 U.S.C. § 152 Fourth) and is in fact a narrow directive making it unlawful for a carrier "to influence or coerce employees *in an effort to induce them to join or remain or not to join or remain members of any labor organization*. . . ." (emphasis added)[17]

If there were any doubt as to the meaning of that unambiguous language, the legislative history confirms that the purpose of Congress in enacting § 2 Fourth was to effectuate employee freedom of choice of representatives by prohibiting carrier interference with the formation of unions, and to ensure the independence of labor organizations by eliminating the "com-

16 In *TWA I*, the thrust of Respondent's argument was that TWA should have tried to negotiate strike conditions as part of the collective agreement. Indeed, the *amici* in support of its position argued that the "practice is common in the railroad industry . . . ." (Brief of AFL-CIO and RLEA, at 17)

17 Almost immediately, IFFA says that language "necessarily" includes "protection from employer retaliation for *strike participation*." (Resp. Br. 6; emphasis added) Later, it becomes a broad proscription of all "adverse employer actions affecting employees' job rights" (Resp. Br. 17 n.14) and then of all "coercive employer action burdening the right to strike" (Resp. Br. 19). These not-so-subtle changes in formulation are apparently intended as a substitute for the language and judicial interpretation of § 2 Fourth.

pany union," *i.e.*, unions controlled or dominated by carriers.[18] Accordingly, the courts have interpreted § 2 Fourth as limited to pre-certification interference with the formation of unions, or egregious anti-union conduct imperiling the very existence of the union as bargaining representative. *See, e.g., Independent Union of Flight Attendants* v. *Pan American World Airways*, 620 F. Supp. 447, 455-56 (S.D.N.Y. 1985), *aff'd*, 789 F.2d 139, 141 n.2 (2d Cir. 1986); *Machinists* v. *Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982); *see also* brief of *amicus curiae* Airline Industrial Relations Conference at 8-21.

In support of its theory concerning the scope of § 2 Fourth, IFFA characterizes it as "closely analogous" to NLRA § 8(a)(3) and asserts that, when Congress enacted § 2 Fourth in 1934, it "had in mind essentially the same concept of what it means to protect union membership as the concept embodied in the NLRA just one year later." (Resp. Br. 17, 18) When this Court in *Communications Workers* v. *Beck*, 108 S. Ct. 2641, 2654 (1988), interpreted NLRA § 8(a)(3) in part by relying on its interpretation of the later-enacted RLA § 2 Eleventh, it did so based on repeated statements in the legislative history that Congress intended § 2 Eleventh "to confer on railway unions precisely the same right to negotiate and enter into union security agreements that all unions subject to the NLRA enjoyed." IFFA offers no such Congressional statements in the history of the Wagner Act concerning NLRA §§ 2(3), 7, 8(a)(3) or 13.

It is no answer to claim, as IFFA does, that "exercise of the right to strike had, by the time of the 1934 RLA amendments, long been recognized as perhaps the central reason for organiz-

18 *See, e.g.*, H.R. Rep. No. 1944, 73d Cong., 2d Sess. at 2 (1934) ("A considerable number of railway managements maintain company unions . . . a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect."); S. Rep. No. 1065, 73d Cong., 2d Sess. at 2 (1934) (emphasis added) (This bill "prohibits the railroads from interfering in any manner whatsoever with employees *joining or refusing to join* any organization or union . . . . This prohibition is not new. . . . But there are no penalties against its violation. This bill provides severe penalties for violation of the law."); *see also BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385 n.20 (1969).

ing unions in the first place, and a necessary concomitant of union membership. . . ." (Resp. Br. 18) Certainly that would have been no less true when Congress enacted the NLRA in 1935. And it would very likely astonish the 1934 Congress to hear that, by amending the RLA to protect employee free choice of unions (thereby assuring that the Act could work to *avoid* disruption to commerce), they were in fact *promoting* strikes because that is "one of the very actions it is the purpose of unions to promote." (Resp. Br. 19) In any event, IFFA's reasoning was soundly rejected in *Burlington*, where the Court refused to imply a prohibition on self-help on the theory that "the drafters of the RLA did not need to insert an express prohibition of secondary picketing because in 1926 federal law clearly prohibited such picketing." 107 S. Ct. at 1851.[19]

If it were true, however, that RLA § 2 Fourth was intended to be the analogue of the later-enacted NLRA §§ 2(3), 7, 8(a)(3) and 13, then this Court's decision in *Mackay Radio*, and its progeny, should compel the conclusion that TWA's retention of employees who worked during the strike did not violate the Act. As the authorities cited in Petitioner's main brief and in

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19 There is in any event no indication that, when the RLA was enacted, replaced strikers remained employees with a right to reinstatement. *Michaelson* v. *United States*, 266 U.S. 42, 69 (1924) (Resp. Br. 19 n.16) did not reach the question. Respondent's brief reads as if the "right to strike"—regardless of the economic outcome of its exercise—insulates strikers from all detriment. The retention of nonstrikers is not something that TWA must justify by pointing to some "*implied* privilege" in the RLA (Resp. Br. 6; emphasis in original) but a long accepted right of employers in response to a union's exercise of self-help. Prior to 1926, strikes in the railroad and other industries were often met by the hiring of replacements and the use of employees willing to work; they were settled, if at all, by back-to-work agreements. *See, e.g., Birmingham Trust & Savings Co.* v. *Atlanta, B.& A. Ry.*, 271 F. 743 (N.D. Ga. 1921); *Union Pac. R.R.* v. *Ruef*, 120 F. 102, 113, 114 (D. Neb. 1902); II J. Commons, *History of Labour in the United States* 349-50 (1918); III J. Commons, *History of Labor in the United States* 117-28, 453-56 (1932). The "right to strike" was not conferred by the RLA; it was *deferred*. Nothing in the RLA insulates strikers from the potential consequences of exercising that right, or deprives TWA of its right to retain in its service employees who worked during the strike. *See, e.g., FEIA* v. *Eastern Air Lines*, 208 F. Supp. 182, 194 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *see also* Pet. Br. 26-31.

the *amicus curiae* brief of the NLRB establish, "refusing to displace permanent employees [whether new hires or early returning strikers] . . . is not inherently destructive of [employee] rights." (NLRB Br. 12)

CONCLUSION

This Court granted certiorari to decide whether the Railway Labor Act requires that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority." The answer to that question is plainly no. Respondent's attempt to change the answer by changing the question is of no avail, for—even under its formulation—neither the RLA, *FEC* nor the expired agreement gives strikers the right to create vacancies, or requires that incumbents be treated as temporary employees, in order not to "burden the right to strike." The decision below should therefore be reversed.

Respectfully submitted,

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